No. 2828

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC FISHERIES, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

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of Juneau, Alaska,
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STATEMENT.

This is a suit by the Government of the United States for an injunction to prohibit the appellant from fishing within a so-called "Reserve" of public waters surrounding Annette Island in Alaska, and to require removal of a fish trap constructed by appellant therein.

The material facts of the case are as follows:

I.

The appellant is an Oregon corporation carrying on the business of catching, canning and marketing salmon, operating three canneries in Alaska, one of which is situated at Chomly and another at Yes Bay.

II.

The principal means of obtaining salmon for supplying all the canneries in Alaska is by use of traps; a trap consists of a line of piles called a "lead" with wire webbing thereon and lateral projections at the end toward which the fish travel called a "heart," which guides the fish into an enclosure called a "pot" which confines them until they are taken therefrom into scows in which they are conveyed to canneries.

III.

In the year 1915 C. A. Burckhardt, president and general manager of the appellant, selected a location for a fish trap, not theretofore occupied, situated in front of a rocky reef adjacent to Cedar Point and Smugglers' Cove on the west side of Annette Island; and in the spring of this year the appellant constructed a trap there at a cost of $4,000, that being the trap which is the principal subject of controversy in this suit.

IV.

Cedar Point projects into Clarence Strait, which at that place is twelve miles wide and is one of the main divisions of the waters of Southeastern Alaska.

V.

The trap as constructed is not an obstruction or impediment to navigation, but being equipped with lights and a bell it is helpful to navigators the same as a light-house would be; and it is not connected with the island, the end thereof nearest to the shore being at least 200 feet seaward from the shore line at low tide, and use of the trap does not require any occupation or use of the island or its shore.

VI.

On the 28th of April, 1916, the President issued a proclamation declaring the waters within a space of 3,000 feet from the shore line at mean low tide surrounding Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets to be a reservation for the benefit of the Metlakatlans and such other Alaskan natives as have joined them or may join them in residence on these islands; and warning "all unauthorized persons not to fish in or use any of the waters" therein described. And within a few days thereafter the appellant was notified of said proclamation and to not fish or trespass within the space therein described.

VII.

The appellant's trap is located within said space and it was completed, except the placing of webbing thereon ten days prior to the date of the proclamation; and prior to that time the appellant had in preparation for this season's operation of the two canneries at Chomly and Yes Bay expended money and incurred obligations to an amount exceeding $500,000 for materials, supplies and labor, in expectation that said trap would to a very considerable extent supply fish for canning in said two canneries.

VIII.

Deprivation of the use of said trap this year must necessarily cause a heavy loss to appellant, estimated at $50,000.

IX.

The appellant gave notice that it would not submit to such deprivation and loss, and denied the lawfulness of the President's Proclamation; this suit was instituted; the appellant answered the bill of complaint and the case was tried and submitted for decision on the merits and the Court rendered a decision and final decree granting the injunction prayed for, unconditionally, which if not set aside will be effective to confiscate appellant's property without compensation.

X.

Prior to the year 1887 the Metlakatlans were a tribe of Indian natives of British Columbia inhab-

iting the village of Metlakatla near Fort Simpson, B. C. They are reputed to have been, in their savage state, cannibals, but superior in physical and mental qualities to other Pacific Coast Indians. As a result of the missionary labors of William Duncan, a minister of the Church of England, they were converted to Christianity and made rapid progress in becoming educated and acquiring skill as mechanics and to a praiseworthy extent adopted the manners of civilized people and became devout members of the Episcopal Church. They constructed and operated a saw mill and erected a commodious church edifice and were generally thrifty and contented.

About the year 1887 the bishop having jurisdiction deposed Duncan from the position of minister in charge of the village and installed a successor; this was for the reason that Duncan had deleted part of the ritual of the church pertinent to the sacrament of the Lord's Supper which he claimed was contradictory of what he had taught the people as to the sinfulness of eating human flesh and drinking human blood. The people revolted against the action of the bishop and to get from under his jurisdiction they emigrated, en masse, to Annette Island. Several United States Senators and prominent citizens became interested in the matter by reason of the peculiar history and conduct of these people and it may be fairly inferred that their influence was potential in securing the enactment in 1891 of the Act of Congress quoted in the President's Proc-

lamation, making the Annette Islands a reservation for their occupancy. Later, recognizing their desire for freedom to engage in commerce and their abilities, Congress enacted a special law authorizing the licensing of Metlakatlans as masters, pilots and engineers of vessels, thereby granting to them privileges not accorded to other aliens.

XI.

The issue made by the pleadings and decided by the District Court, as epitomized in the memorandum decision filed is as follows:

> "The Government by this suit seeks an injunction to prevent the defendants from operating said trap and to compel the removal of said trap, basing its suit on the claim that the continuance of the trap at the *locus quo* is in defiance and violation of the terms of the act and the proclamation, and is also in violation of section 10 of the Rivers and Harbors Act approved March 3, 1899.
>
> Defendants contend that the Act itself does not reserve any water and that the proclamation is unauthorized so far as it attempts to reserve any part of the waters and so is null and void, and that the trap is not an obstruction to navigation and so does not come under the inhibition of the Rivers and Harbors Act aforesaid."

ASSIGNMENTS OF ERROR.

First Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 1 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 1, which said proposed (166) Finding of Fact No. 1 is in words and figures as follows:

> "Defendants' Proposed Finding No. 1.
>
> The Court finds that in August of the year 1915, the defendants, pursuant to observations previously made, went upon the present site of the defendants' fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of the feasibility of constructing a fish-trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants' trap was practicable and feasible."

Second Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said

proposed Finding of Fact No. 2 is in words and figures as follows:

"Defendants' Proposed Finding No. 2.

The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to drive and construct a fish-trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred ($18,500.00) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerable in excess of twenty-five thousand ($25,000.00) dollars." (167)

Third Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

"Defendants' Proposed Finding No. 3.

That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand ($4,000.00) dollars."

Fourth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

"Defendants' Proposed Finding No. 4.

That all available sites for fish traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery."

Fifth Error Assigned.

That the District Court for the Territory of of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 (168) stated, which Finding No. 1 as made by the Court is in words and figures as follows:

"That by the 15th section of the Act of Congress approved March 3, 1891, entitled "An Act to Repeal the Timber Culture Laws' (26 Stats. L. 1101) and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakatlans and other Indians, the following lands and waters, to-wit: 'The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the north

side of Dixon's Entrance' and 'the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'the bays of the said islands, rocks and islets'; and that by said Proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' "

Sixth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the Court is in words and figures as follows:

"That prior to the issuance of the Proclamation hereinbefore mentioned T. A. Heckman, superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government."

Seventh Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the Court is in words and figures as follows:

"That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain possession of the area enclosed by said piles and refuses to remove the same and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch (169) therein large numbers of valuable fish and will further trespass upon said land and water so reserved as aforesaid to the irreparable injury of plaintiff, both in its sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law."

Eighth Error Assigned.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants 'Proposed Conclusion of Law No. 1, is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their common right of fishery, and being so

engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequet proclamation of the President or otherwise without compensation."

Ninth Error Assigned.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 2 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 2 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 2.

The Court concludes as a matter of law that the reservation of Annette Island as made by the Act of Congress March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress." (170)

Tenth Error Assigned.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude

as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 3 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 3.

> From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever."

Eleventh Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

> "That plaintiff is entitled to an injunction as prayed for in the complaint."

Twelfth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in entering its judgment and decree herein, which is in words and figures as follows: * * * . Record, p. 212.

The concrete questions comprehended in the issues, stated concisely by Judge Jennings in his memorandum decision are as follows:

FIRST.

The Government affirms and the appellant denies that the erection of appellants' fish trap was an

invasion of a reservation created by Act of Congress, and therefore, its use by appellant is prohibited by law.

SECOND.

The Government affirms, and the appellant denies, that said Act of Congress supplemented by the President's proclamation creates a reservation comprising waters surrounding Annette Island including the space in which said fish trap is situated, and therefore, the erection and intended use of said trap by appellant is in defiance of the Government.

THIRD.

The appellant affirms and the Government denies that the President's proclamation is unlawful and void.

The only additional question within the issues tendered by the bill of complaint was decided adversely to the Government; therefore we assume that it is not involved in this appeal.

If counsel for the appellee shall make any argument upon it we will make answer thereto in a reply brief.

ARGUMENT.

From start to finish our argument aims at one object, that is to demonstrate that:

There Is No Equity in the Bill.

It is to be kept in mind that the suit is not defensive of any policy of conservation having regard

to the greatest good to the largest number; an injunction is prayed for not to protect salmon from the rapacity of destroyers; viewed either as being a measure of benevolence designed by the Government for the special and exclusive advantage of the small number of people inhabiting Annette Island, which it is not; or as a scheme to suppress competition in fishing for the exclusive advantage of one individual, which it is, the suit, if successful, can only promote monopoly detrimental to the public welfare.

Taking up the questions stated, successively in their order, the appellant controverts the claim asserted in behalf of the Government that the location of appellant's fish trap is within the boundaries of the reservation established by an Act of Congress.

That location is entirely within space covered by water; the end of the trap nearest to the shore at the line of extreme low tide being distant from said line at least 200 feet.

The Act of Congress is a grant; not a conveyance of title; but grants a license to occupy *land*. The license is temporary, that is to say, revocable at the will of the grantor, and the licensees are free to occupy or not, according to their own free will.

The Act is not a contract, the license being a mere gratuity without any consideration therefor exacted, received or promised.

The licensees are aliens to whom the United States was not and is not obligated in any way,

except to afford them governmental protection in the enjoyment of such rights as pertain to alien sojourners or denizens.

The Metlakatlans are not by reason of destitution or condition of helplessness objects of charity; they are a thrifty people and as well able to provide for their own support as the majority of citizens are. The policy of our Government is to prohibit immigration of alien paupers and those likely to become a public charge and to deport that class of aliens found in this country. The gate was left open for these people to enter and land was reserved for them to occupy and they are by a special Act of Congress permited to engage in commerce as masters, pilots and engineers of steam vessels, as a matter of grace, by reason of sentiment favoring them above all other aliens, because they had before emigrating from their native home advanced from a state of savagery and become educated, thrifty, capable and self reliant. Their status in this country is not the same as that of the original occupiers of the soil, who upon being dispossessed were entitled to have reserved for their use some of the lands and permanent rights of fishery and in the natural resources supplying their necessities.

The circumstances and conditions above outlined afford no justification for any strained or latitudinarian construction of the Act of Congress making a reservation of the Annette Islands. The Act is not ambiguous and it is not permissible to construe

it in a way to expand the boundaries prescribed. The descriptive words of the Act indicative of the extent and limitations of the reservation are "body of lands," and "Annette Islands." An island is a tract of land completely surrounded by water, therefore the boundary of an island must be the line of separation between the mass of matter such as earth and rock constituting land and the liquid element surrounding it, called water. The Government surveys of land terminate at the water's edge.

Barney v. Keokuk, 94 U. S. 324-328, 24 L. Ed. 224;
Mann v. Tacoma Land Co., 44 Fed. Rep. 27; affirmed in 153 U. S. 273-286.

Hence, a grant or reservation of a body of land described as an island is a tract having a water boundary; all within the line of separation between the solid and liquid elements constitutes the granted or reserved tract.

The only absolute right appurtenant to land bounded by navigable water is the right of access; the water being a public highway the proprietor of an island or anyone having a license from the proprietor to occupy the same has a special right to use it as a highway the same as any land owner has to insist that a road which affords means of access to his property shall be unobstructed.

Littoral rights, including the rights to erect and maintain wharves and warehouses in aid of commerce, if not in conflict with an asserted paramount

right of the Government, may entitle a shore owner to prohibit others from any occupancy or use of the space between the lines of high and low water, but an assertion by such owner of proprietary or exclusive rights in the waters adjacent to his property has no sanction in the jurisprudence of this country.

This Court in a case appealed from the same court which rendered the decree appealed from herein decided, in effect, that an exclusive right to maintain a fish trap in the navigable rivers of Alaska is not appurtenant to ownership of adjacent land.

Baron v. Alexander, 206 Fed. Rep. 272.

The argument which has been made in behalf of the Government upon an assumption that, because the Metlakatlans are to a large extent fishermen and dependent upon industry in that occupation for means of support, Congress must have intended to bestow a bounty in making a reservation for them, therefore, the exclusive right of fishery in all the water surrounding the Annette Islands was granted to them by necessary implication is obviously fallacious, because, such exclusive right is not necessary to the pursuit with beneficial results of their calling as fishermen. They are not restricted to any particular locality or district in which to take fish unless by reason of being aliens they are by law prohibited from taking fish in any waters of Alaska.

The legislators who framed the Act were capable of selecting words and terms sufficient to express clearly the full intention of the enactment and if Congress had intended to grant extraordinary rights in addition to setting apart an island for them to occupy the Act would have been so phrased that the President would not have deemed it necessary or proper to amplify its provisions in a Proclamation.

It is not permissible to interpolate words into a statute in order to change its meaning or broaden its scope.

> *Newhall v. Sanger,* 92 U. S. 765, 23 L. Ed. 769.

NO PROOF SUPPORTING THE CLAIM THAT FOR 25 YEARS THE METLAKATLANS HAVE HELD EXCLUSIVE POSSESSION.

In this connection it is important to observe that the attempt to establish an exclusive right by prescription is a total failure for lack of proof. The nearest approach to competent evidence bearing upon the point is in the affidavit of Edmund Verney, the mayor of Annette Island. He is a Metlakatlan who has made his home upon the island ever since it was made a reservation by the Act of Congress. His testimony on page 58 of the printed record is as follows:

> " * * * ; that the rights of the Indians residing on said Annette Island have always been maintained by them and respected by other

people until the year 1916, when said Alaska Pacific Fisheries, a corporation, have claimed the right to have constructed and maintain a fish-trap at said above-mentioned locations; and this last mentioned instance is the first in which the right to drive and maintain fish-traps in defiance of the rights of the United States and of the Indian residents of said Annette Island under said Act of Congress approved Mar. 3, 1891, and of the subsequent proclamation of the President of the United States, dated April 28, 1916, has been attempted."

By this it appears that the first public notice of claimed exclusive rights of fishery was the President's Proclamation and "defiance" thereof was immediate. It will not be denied that the *rights* of the Indians on Annette Island have always been maintained by them and respected by other people; as much might be said, truthfully, concerning *rights* of many people. The same affidavit states some pertinent facts, absolutely disproving adverse possession of the fishing grounds in question, at any time prior to the year 1914. In that year the first fish trap located in water contiguous to Annette Island was put there; and in the year 1915 permits were issued for three traps including one to Charles Brendible. By the uncontradicted testimony of C. A. Burckhardt it is proved that the Brendible trap was erected by this appellant; it paid wages to Brendible for his work in procuring pile timber and in operating the trap; it furnished the other mate-

rials and the pile driver and the trap was operated during the fishing season of 1915 under a partnership agreement whereby the profits if any were to be divided between Brendible and appellant; it took the fish caught in the trap and credited the market price against the cost of the trap and operation. That was, in reality, a fishery projected and managed as a joint enterprise of a white man and a Metlakatla Indian.

Record, pp. 96-105-6.

The Government wanders far afield to find arguments when the descriptive words of the Act are given a free translation synonymous with the word "region" and comparable in vastness with the whole of Alaska, or the Philippine Islands or Porto Rico.

If the judicial sanction which has been given to this preposterous proposition shall be confirmed in the final determination of this cause bureaucratic ambition to confiscate all that has been invested by citizens in the fishing industry in Alaska will be highly elated; it will not be long until all fishing rights will be dominated by the leasing system, ostensibly, for the benefit of Indians, but really for the advantage of a monopolistic trust; and graft and scandal will be the final outcome.

If in framing the Act Congress could have anticipated such extraordinary presumption; it is not probable that words to describe and limit the reservation with accuracy and precision, better or more apt than the words of the Act would have been se-

lected. With the object in view of granting a mere privilege to occupy temporarily a location adequate for a comparatively small community, instead of making a reservation comprising a vast region or grand geographical division of country, Congress prescribed the boundaries in the words of the Act, viz.:

> "the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance."

So much, and only so much, was segregated from the Territory of Alaska for the particular use specified.

PRECEDENTS.

It is contrary to the policy, and a variance from the practice of the Government to grant monopolistic privileges or exclusive rights in public waters; and in construing Congressional grants of *land,* the courts have consistently held that the proprietary rights of grantees of land abutting upon shores of navigable water, terminate at the line of ordinary high water. A striking instance is in the decision of the Supreme Court construing the Oregon Donation Law in the case of *Shively v. Bowlby,* 152 U. S. 1-58, 14 Sup. Ct. Rep. 548, 38 L. Ed. 331.

The exhaustive opinion in that case furnishes the best guide for the interpretation of the Annette Island reservation act. There is no history connected with legislation that is more interesting and

instructive than the history of the old Oregon country. "Old Oregon country" is a phrase descriptive of the whole region comprising approximately 300,000 square miles of territory embracing the present States of Oregon, Washington, Idaho, and all of Wyoming and Montana west of the Rocky Mountains, and was a subject of contention between our government and Great Britain. The country was in the grasp of the Hudson's Bay Company whose policy was to hold it as long as possible as a game preserve. It was wrested from the domination of that corporation by emigrants from Eastern states, who thereby rendered a service of incalculable value to our nation and to humanity. After the international question had been settled by treaty in the year 1846 Congress to reward the pioneers and encourage them in their undertakings as founders of commonwealths, enacted the Donation Law, conferring rights to the designated beneficiaries to acquire titles to specified quantities of land. The objects of the law were beneficient, its provisions were contractual and for adequate considerations in national benefits received and to be rendered, by developing the wealth of the country. The pioneers were empire builders, and the use of the shores and waters contiguous to the lands selected by them was essential to the accomplishment of their purposes, especially for the erection of wharves and buildings as aids to commerce. These conditions afforded cogent reasons for application of the rule of liberal construction of the law with

respect to shore rights of the donees made especially valuable by their improvemnts for public convenience. The decision in the case cited, however, adhered rigidly to the prevailing rule for construing Congressional grants of land which limits the definition of the word "land" within its common and ordinary meaning, so that in the application of the law to a tract bounded by the shore of navigable water, the proprietary rights of the grantee terminate at the line of ordinary high water, and does not include exclusive rights in the shore or contiguous waters.

No claim to shore rights, nor to space between the lines of high water and low water is contested by the appellant; the issue is clean cut and involves only a claimed *exclusive* right of fishery offshore. The rule for construing Congressional grants of land, which limits such grants to upland, is applicable to this case, because it precludes all claims to granted rights, by implication, to territory exterior to a water boundary, which, in cases of grants reaching to navigable water, is the line of ordinary high water. That rule, though broader than our contention, supports it. If it shall be deemed proper to assume that the reserve includes the whole of Annette Island including it shore, and by reason of the plural word "Islands" to include also the small adjacent islets and the shores thereof, the case may rest on that assumption, and still the trap will not be an encroachment upon the reserve. An exclusive right of fishery offshore is different from

a right appertaining to land, so different in essence, so extraordinary, and so unnecessary to the beneficial use of land, that it does not come within the category of rights appurtenant to the title to real estate.

Baron v. Alexander, 206 Fed. Rep. 272.

"From the wild and wandering nature of fish they are not, nor can they be, the subject of ownership in running streams, * * * in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein."

Parker v. People, 111 Illinois 588.

A body of land is not an area of water, and an island is distinct from the water surrounding it. The act is specific, making a reserve of the "body of lands known as Annette Islands." There can be no addition of space exterior to the reserve, nor of rights in such exterior space by mere implication, without disregarding the plain significance of the words "lands" and "Islands" and interpolating, by supposed intendment, other words to express the legislative will to include exterior space of unlimited extent.

What does the act reserve? Answer—A body of lands.

What particular body of lands? Answer—Annette Islands.

Sentimental construction, rather than legal interpretation of the Act, is what the Government con-

tends for, as being requisite to fulfill an imaginary promise of the Great White Father to confiding children.

The relevant fact is that these Indians were led by a courageous white man to immigrate to, and occupy Annette Island, without any invitation, or promise; the idea of their being deceived or trapped is ridiculous. Previous to their coming the plan to set apart Annette Island as a reservation for them, by an executive order, had been disapproved, as illegal, by the Attorney General of the United States; and it was not until three years after their settlement on the island that Congress passed the Act. Tameness is not characteristic of Indians either before or after they have been educated in the ways of white people, and a religious community having enough independence to revolt against the authority of a bishop could never be caught in a trap that had to be constructed while they were waiting to get into it.

In one of its most recent decisions the Supreme Court held that even a reservation of fishing and hunting rights contained in a conveyance of land, made by Indians, may not be so construed as to vest in the grantors exclusive rights, nor to include, by implication, rights not contemplated by the parties at the time of the transaction.

New York ex rel. Kennedy v. Becker, U. S. Adv. Ops. 1915, p. 705; —— Sup. Ct. Rep. ——, —— U. S. ——, 60 L. E. ——

THIS CASE AS ONE OF FIRST IMPRESSIONS.

As a reason for disregarding the adjudicated cases as precedents of controlling authority in this case, it has been contended that the Annette Island Reservation Act is a thing of its own kind. It is true that the Act is unique and being so regarded the decision called for appeals to the conscience of a court of equity; mere sentiment should not outweigh sense and justice. The Government in this case demands a sacrifice of the appellant's property and rights acquired legitimately in the prosecution of an industry beneficial to mankind in general, and therefore, deserving of protection in a court of equity. Citizens, upon whom the Government must depend to fight and pay taxes to defend and support it, are entitled to have their rights respected. Confiscation of the property of citizens for the mere purpose of benevolence to aliens is what representatives of the Government in this case are demanding. The demand under the guise of a benevolent purpose is nothing less than rank injustice intolerable in a court of equity. In a case of first impressions, without a justifiable cause for an unusual or strained construction of a statute which is free from ambiguity and, therefore, not a subject calling for application of mere theories for its interpretation, the demand is shameful rather than meritorious.

The Act is special, for a special object, and that object was not to assume a burden to provide means of support for indigent foreigners; any difference

between the reserve and other Indian reservations leaves the Act in the class of special statutes, and subject to the rules applicable for interpretation of special statutes. Every word therein must be deemed to have been selected to express accurately the legislative will, so that what is expressed negatives all that might be implied. *Expressum facit cesare tacitum.*

THE ACT COUPLED WITH THE PROCLAMATION.

Proposition No. 3 above set forth is a traverse of Proposition No. 2, therefore both will be discussed connectedly.

There is in the second proposition, impliedly, a double admission; it amounts to an admission that the Act alone is insufficient to support the contention that the reservation includes water space surrounding it, or to constitute a grant of exclusive rights of fishery. There is a further implied admission that the proclamation does not of itself create a reservation, nor exclusive rights of fishery. The two implied admissions being the logical product of the copulative conjunction. However, without these implied admissions the only conclusion of the whole matter must be that, neither the Act by itself, the Proclamation by itself, nor the two coupled together transform the substance of water into land, nor warrant an assumption that the boundaries of a grant prescribed by an Act of Congress are so expansible

as to include rights and benefits in the use of contiguous waters, merely because the grant would be more valuable with such rights and benefits appended.

The President is not authorized by the Constitution, or any law, to appropriate any part of the public domain, either land or water, to make a reservation for the benefit and use of Indians who are *aliens*. The whole argument attempting to maintain the validity of this Proclamation is fallacious for the reason that it leaves out of consideration the very substantial difference between the obligations of our Government towards Indians whose homes in our country are theirs by birthright and mere gratuitous benevolence towards Indian immigrants. All the authorities supporting the proposition that a reservation for Indians may be set apart by an Act of Congress, by a treaty, or by an executive order have reference to reservations for Indians who have natural rights to inhabit this country, and who are deemed to be wards of the nation, and subject to laws for their benefit to be executed by the executive branch of the Government. The Metlakatlans have no such natural right, nor do they have the status of natives under guardianship. The law on this subject is clearly and fully set forth in the opinion by Attorney General Garland, dated February 28, 1887, 18 Opinions of Attorney Generals, page 557.

That opinion is based on fundamental principles and it is sound, now, as it was when President Cleve-

land heeded the advice of the eminent attorney general who gave it. Those principles deny authority in the executive branch of the government to grant special privileges to aliens, derogatory to rights of citizens. An executive order making an original reserve of unappropriated land for temporary use would be less harmful and, therefore, less obnoxious to the supreme law of this nation, than a proclamation extending to new territory exclusive rights, involving confiscation of property and deprivation of existing rights of citizens.

John Marshall, the great Chief Justice, made the announcement that ours is a government of laws and not a government of men. The President is not vested with dictatorial power so that he may take from all the people that which belongs to all the people, and bestow it as a mere gift to whomsoever he will. The boast of Americans that ours is the best government ever designed by man is a vain boast, unless it be true that ours is better than popular governments which preceded it, because we have a written Constitution which is the paramount law of the land, which regulates and controls the operations of the Government as a perfect machine whose parts work in combination, but separately, in a way to check excesses in exercise of authority. The Constitution distributes the powers of the government between the three co-ordinate branches and every attempt of the executive branch to legislate, either by proclamation as an original measure, or by adding to or taking away from the enactments of

Congress, is an unlawful usurpation and, therefore, null and void.

Williamson v. United States, 207 U. S. 425. 52 L. Ed. 278, 28 Sup. Ct. Rep. 163.

These considerations are especially pertinent in view of a reference made in the memorandum decision of the Court below to the provisions of Article IV, Section 3 of the Constitution. The Court said truly that:

> "The Congress, representing the people of the United States, has under the Constitution the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This is in terms an express grant of power *to Congress,* to be exercised only in the mode required for the enactment of laws. The President is not *Congress,* and we wish to emphasize the point that every attempt by a proclamation to exercise power vested only *in Congress,* is an unlawful usurpation.

Congress alone has power to make rules and regulations respecting Alaska, as territory of the United States, and its governmental power is to be exercised in view of the purpose for which our government may lawfully acquire territory, that is to say, with a view to the erection of new states to enter the Union on an equal footing with the original states. Congress has declared the status of Alaska to be territory eligible to become one or more states

of the Union which will have governmental and proprietary rights with respect to its waters.

Act of May 14, 1898, 30 U. S. Stat. 409, 1 F. S. A. 45.
Comp. Laws of Alaska, 1913, Sec. 92.

There are precedents for proclamations and executive orders which if valid would be legislative in effect; there may be instances in which such usurpations of legislative power have not been condemned by the judiciary. On the other hand the courts have usually been sensitive of any derangement of governmental machinery in this particular and have vindicated the Constitution by nullifying executive orders which encroach upon legislative power.

A notable instance is the decision of the Supreme Court in the case of *Nelson v. Northern Pacific Railway Company,* 188 U. S. 108; Sup. Ct. Rep. Vol. 23, p. 302, 47 L. Ed. 406. Nelson was a settler of public land of the United States, claiming part of an odd-numbered section within the limits of the land grant made to the Northern Pacific Railroad Company. His right to acquire the title was contested and had been rejected by the officers of the land department for the reason that at the time of initiating his settlement the section, though not within the limits of the grant as fixed by any previous definite location of the line of the Northern Pacific Railroad, was within limits having reference to preliminary designations of contemplated locations of the railroad. Before the actual final survey

and definite location of the railroad, it had been the practice to file in the General Land Office maps of the general route made from surveys indicating lines which might be ultimately selected, and it was deemed necessary to prohibit settlements and filings on odd-numbered sections which might ultimately be found to be within the limits of the grant, in order to prevent diminution of the grant by the vesting of rights prior to the definite location of the railroad, and for that reason executive orders were issued from time to time withholding from settlement thereon odd-numbered sections. Then it was not Metlakatlans but a railroad corporation that was the beneficiary of the Government's bounty and then, as now, the executive was moved to make the grant better than the wisdom of Congress had prescribed, and in utter disregard of the rights of citizens the odd-numbered sections within the public domain extending from Lake Superior to Puget Sound and Portland, Oregon, were reserved until such time as the railroad officials might find it convenient to make their definite selections of a route. Nelson was obstinate in holding on to his claim and improved it as a farm, and the Land Office afterwards issued a patent to the Railroad Company conveying a title including Nelson's improvements. The Supreme Court, however, awarded the land to him for the reason that his right was initiated anterior to the time when the railroad grant attached to the section in which his claim was located, and held the preliminary withdrawals of public land for the bene-

fit of the railroad, by executive orders, to be unauthorized and, therefore, null and void.

RULES, REGULATIONS AND RESTRICTIONS TO BE PRESCRIBED.

The Act provides that the reservation shall be held and used by the licensees in common,

> "under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

Manifestly this last clause of the Act does not confer legislative power upon the executive branch of the government to amend the Act by any enlargement, extension, or curtailment of the area reserved; or by adding thereto a grant of an extraordinary exclusive right of fishery in water not within that area. What does the Act say shall be—under rules and regulations and subject to restrictions to be prescribed?

The answer to that question is obvious; the implied authority to prescribe rules, regulations and *restrictions* is governed by the preceding words—"to be held and used by them in common": and by the Constitution of the United States, which distributes the powers of the government between its three branches, so that Congress may not in any instance delegate power to the executive branch to

prescribe rules or regulations effective to amend, alter, or change the meaning of statutes.

Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. Rep. 163, 52 L. Ed. 278.

The Proclamation contains in its preamble the following recitals:

> "Whereas the Secretary of the Interior, with a view to assisting the Metlakatlans to self support, has decided to place in operation a cannery on Annette Island; and whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery."

Here we have a declaration of intention on the part of the Secretary of the Interior to undertake an industrial enterprise to aid the Metlakatlans to self support, coupled with the further declaration that for the success of the proposed enterprise a reservation of the fishery in question is necessary. If our government is to engage in such an enterprise to assist the needy there are plenty of American citizens whose needs are more urgent than the Metlakatlans. The government was ordained and established and is being supported by its citizens for their own welfare and benefit, and its duty is to them, insofar as it may be deemed to have a duty to assist the needy. It has no more right to employ

its energies and resources for the benefit of Metlakatlans than it would have to do as much for a colony of Belgians, or afflicted people in any foreign country who may seek betterment of conditions by voluntarily immigrating to and occupying a vacant island in Alaska. There are plenty of such communities in districts where war, famine and floods have inflicted desolation and heart-rending misery. The Metlakatlans, however, are not in a situation of distress entitling them to appeal for charity; they are as well able to support themselves in comfort as the majority of American citizens are. Our government if wisely administered would be just before being generous, or, if generous, would look for objects among its own citizens more in need of its benefactions.

> "If any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel." I Timothy 5-8.

The assigned reason for the Proclamation is untrue because the Secretary of the Interior is not only unauthorized to engage in such an enterprise but unable to do so for lack of necessary capital. For the construction and equipment of a cannery and necessary materials for the business of canning salmon a preliminary outlay of a large amount of money is absolutely necessary and until Congress makes an appropriation for the purpose the Secretary of the Interior cannot command a dollar for such purpose. It is equally untrue that any reser-

vation of a fishery is essential to the operation of a cannery. There are many canneries in Alaska which have been operated successfully for many years without having as yet broken down the principle that fish in the sea are nature's bounty to which all the people have equal rights.

NO PROOF OF THE DECLARED INTENTION CONTAINED IN THE PRESIDENT'S PROCLAMATION.

If it were true that the Secretary of the Interior had actually decided to operate a cannery the fact of such decision should have been proved in support of the complaint in this case, but there is no such proof; the nearest approach to evidence of the intention is to be found in the affidavit of D. Noll (Record, p. 60), in which he says:

> "That the plaintiff has now made further arrangements for the upbuilding of said fishing industry for the benefit of said Metlakatlans and has encouraged them to drive traps for the purpose of catching fish * * * .
>
> The defendant for the purpose, among others, of thwarting the plaintiff in its said plans and arrangements and annoying, harassing and injuring the plaintiff therein and destroying said scheme and injuring said Metlakatlans has driven a fish trap on the west coast of said reservation at or near Cedar Point."

In other affidavits there are similar hints of arrangements, plans and a scheme, but nothing nearer

definite proof of facts indicating the real intention of the Secretary of the Interior with respect to a fish cannery.

There is a reason for this withholding of evidence disclosing the real *intention, plan, arrangement* and *scheme* which are almost, but not entirely hidden. The thing decided upon by the Secretary of the Interior was not the operation of a cannery but the granting of a lease to a man named P. E. Harris, who is not a Metlakatlan, and granting to him a monopolistic right of fishery in the proposed reserve. A partial disclosure is in the affidavit of Harris on page 55 of the printed Record and in the testimony of C. A. Burckhardt, on his cross-examination. Record, pp. 116-118. The *scheme* is more fully revealed in a speech by Honorable James Wickersham, representing Alaska in Congress, as its delegate, printed in the Congressional Record under date of July 25, 1916. We quote from a pamphlet issued from the government printing press:

> "Quite recently Secretary Lane caused the reservation of 3000 feet in area around Annette Island, excluded all Alaskans from fishing in the area, and leased the privilege of that fishery to a non-resident fish trust employee, giving him a written contract in the name of the United States for a special fishing privilege there for five years. If Alaskan waters are thus subject to the Secretary's contracts the fisheries of Alaska may next be leased to the Fish Trust and all Alaskans excluded."

The Proclamation is the first and only public assertion of exclusive rights of fishery in the public waters of Alaska. It was not issued until after the appellant located and constructed its fish trap, involving an investment of a large amount of money, with due observance of the fishing laws enacted by Congress.

The claim that appellant had foreknowledge of an intention to make a reserve of fishing ground including the location of its fish trap, by an executive edict, is based on nothing except the affidavit of Harris (Record, p. 55), alleging an admission made to him by Tom Heckman, at an unremembered date,

> "that he then knew about the lease, and of the Proclamation of the government about to be published in regard thereto, and that his said Company also knew thereof."

Before accepting an ex parte affidavit as proof of such an extraordinary fact the Court should have information as to how a mere intention of the President could have leaked out, or have been communicated to a man at Ketchikan, not having any confidential relationship with the President or any member of his Cabinet. The evidence in the record is too flimsy to support a finding of any material fact; and the finding which the Court below did make (Record, p. 189), that Heckman made such statement to Harris, prior to the issuance of the Proclamation, is of no importance whatever, because it falls far short of proving that the appellant challenged a contest with the government by placing

a trap, where its right to do so was denied, or to be disputed. A finding reaching to that point was not made, and could not be made, consistently with the evidence, for the reason that uncontradicted evidence proves that immediately previous to driving the trap appellant obtained information through its representative at Washington, D. C., to the effect that no exclusive right of fishery would be granted in or by the contemplated lease to Harris, and that appellant did not have notice or any knowledge of or concerning the Proclamation prior to May 4th, 1916, on which date a telegraphic notice was received from an Assistant Secretary of the Interior. Testimony of C. A. Burckhardt, Record, pp. 87-118-119.

Since Magna Charta control and regulation of fishing rights has been, and is, by the common law of England a legislative function; Crown Grants of exclusive rights being expressly forbidden, and in the jurisprudence of this country based upon the common law the right of fishery in public waters belongs to all the people, controlled and regulated within the States of the Union by statutes enacted by their respective legislatures.

Gould on Waters, 3rd ed., Sections 1, 2, 30, 32, 34, 36, 39, 189.

McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.

Manchester v. Massachusetts, 139 U. S. 259-260, 35 L. E. 159, 11 Sup. Ct. Rep. 559.

United States v. Shauver, 214 Fed. Rep. 157.

United States v. McCullagh, 221 Fed. Rep. 292.

The power to govern the territories is vested in Congress.

National Bank v. County of Yankton, 101 U. S. 133, 25 L. Ed. 1046; 1 Kent's Comm. Star. p. 384.

This means that the power of the government is to be exercised by Congress in like manner as governmental power is exercised by the states within their territorial boundaries, and as to matters subject to regulation by legislative enactment Congress must act. The President cannot govern the territories by proclamations.

We respectfully submit to this Court that the Proclamation is an absolute nullity for three good and sufficient reasons, viz.:

1. Issuance thereof was an attempted exercise of power not vested in the President.

2. The assigned reasons for the Proclamation are insufficient because based upon false pretenses.

3. Its enforcement will work rank injustice by the confiscation of property legitimately acquired in the pursuit of a lawful business in a lawful manner.

NO EQUITY IN THE BILL.

The Proclamation which the decree appealed from would enforce, is an unrighteous attempt to assume dictatorial power and use it oppressively to

crush an independent enterprise standing in the way of monopolists avaricious to absorb all of the fishing rights in Alaska. The assigned reason for its issuance is not to foster an industry beneficial to the nation, nor to conserve natural resources by protection of salmon from extermination, but to stimulate activity of inhabitants of Annette Island that more fish may be caught by them. Therefore, the case is not grounded in equity. On the other hand the defense pleaded and proved is meritorious and complete. For maintenance of the great principle of Liberty Regulated by Law citizens must ever struggle; this case proves that the most dangerous enemies of the Constitution are those who in disregard of official duty work insidiously to undermine its foundation. We sincerely and earnestly claim that the appellant appears in the attitude of a contender for a fundamental principle, as well as defender of a right; in resisting confiscation it is performing a patriotic service defending the Constitution of the United States. To support and defend the Constitution is an obligation to be observed, and of first importance in the decision of this case.

C. H. HANFORD,
Solicitor for Appellant.

APPENDIX.

REFERENCES TO STATUTES.

For convenience the Statutes to which the Court may refer are here cited in a group.

1. Act reserving Annette Island for the Metlakatlans—Sec. 15 of Act to repeal Timber Culture Law. March 3, 1891, 26 U. S. Stat. 1101.
2. Declaratory Law, defining status of Alaska as a Territory and prospective State and defining Navigable Waters therein. May 14, 1898—30 U. S. Stat. 409—1 F. S. A. 45—Compiled Laws of Alaska, 1913, Sec. 92.
3. Fisheries Law of Alaska, June 26, 1906. 34 U. S. Stat. 478—Pierce's Fed. Code, Sec. 4086—U. S. Comp. Stat. Supp. 1911, 1228.
4. Jurisdiction of Department of Commerce, including Fisheries, Feb. 14, 1903—32 U. S. Stat. 825—Pierce's Fed. Code, Sec. 3970—U. S. Comp. Stat. Supp. 1911, 115—10 F. S. A. 58.
5. Licensing of Metlakatlans as Masters, Pilots and Engineers, March 4, 1907—34 U. S. Stat. 1411—Comp. Laws of Alaska 1913, Sec. 24.

LIST OF AUTHORITIES CITED.

Barney v. Keokuk, 94 U. S. 324-328, 24 L. Ed. 224.
Baron v. Alexander, 206 Fed. Rep. 272.
Manchester v. Masachusetts, 139 U. S. 259, 35 L. Ed. 159, 11 Sup. Ct. 559.
McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.
Nelson v. N. P. R. Co., 188 U. S. 108, 47 L. Ed. 406, 23 Sup. Ct. 302.
Newhall v. Sanger, 92 U. S. 765, 23 L. Ed. 769.
National Bank v. County of Yankton, 101 U. S. 133, 25 L. E. 1046.
New York v. Kennedy, U. S. Adv. Ops. 1915, 705.
Parker v. People, 111 Illinois, 588.
Shively v. Bowlby, 152 U. S. 1-58, 38 L. E. 331, 14 Sup. Ct. 548.
United States v. McCullagh, 221 Fed. Rep. 292.
United States v. Shauver, 214 Fed. Rep. 157.
Williamson v. United States, 207 U. S. 425, 52 L. E. 278, 28 Sup. Ct. 163.
I Kents' Commentaries, Star page 384.
Gould on Waters, 3rd Ed., Sections 1, 2, 30, 32, 34, 36, 39, 189.